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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,473	12/08/2003	Jeffrey A. Johnson	13789/0001	2867

23531 7590 08/05/2005

SUITER WEST SWANTZ PC LLO  
14301 FNB PARKWAY  
SUITE 220  
OMAHA, NE 68154

EXAMINER

WOOD, KIMBERLY T

ART UNIT	PAPER NUMBER
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3632

DATE MAILED: 08/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/730,473

Applicant(s)

JOHNSON, JEFFREY A.

Examiner

Kimberly T. Wood

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09 May 2005.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,2,7,9,19-21,27,28 and 30 is/are pending in the application.  
4a) Of the above claim(s) 3-6,8,10-18,22-26 and 29 is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1,2,7,9,19-21,27,28 and 30 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 5/9/05 2/28/05

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_  
5) ☐ Notice of Informal Patent Application (PTO-152)  
6) ☐ Other: \_\_\_\_\_

This is an office action for serial number 10/730,473, entitled Adjustable Musical Instrument Stand, in response to Amendment filed on May 9, 2005.

***Election/Restrictions***

Claims 3-6, 8, 10-18, 22-26, and 29 withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on May 9, 2005.

Applicant's election without traverse of Species I drawing to Figures 1 and 2 in the reply filed on October 29, 2004 is acknowledged. The traversal submitted in reply filed on May 9, 2005 is on the ground(s) that the specification discloses a species having an adjustment mechanism being hydraulic; or a winch, cable, and pulley mechanism; or a pump and piston. This is not found persuasive because the election was based solely on the Figures 1 and 2 that do not disclose an adjustment mechanism/means being hydraulic; or a winch, cable, and pulley mechanism; or a pump and piston. The applicant is correct in pointing out that the specification does state that figures 1 and 2 could have these alternative species including "another mechanism that may be used would be a winch and pulley system..."

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however as stated these features would lead the examiner to view the additional features as separate species. Therefore, the species of the adjustment mechanism being hydraulic; or a winch, cable, and pulley mechanism; or a pump and piston would be separate or distinct species from that of the species of the figures 1 and 2 which the applicant elected.

Newly submitted claim 29 directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: The first, second, and third horizontal members as claimed would be directed to a separate species from figure 1 and 2. The additional horizontal members are distinct from the original claims that only included the support including only one horizontal member as shown in figures 1 and 2 as elected by the applicant's reply mailed on October 29, 2004.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claim 29 withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

The requirement is still deemed proper and is therefore made FINAL.

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This application contains claims 3-6, 8, 10-18, 22-26, and 29, drawn to an invention nonelected with traverse in Paper mailed on May 9, 2005. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 7, 19-21, and 30 are rejected under 35 U.S.C. 102(b) as being anticipated by Pierce et al. (Pierce) 5,483,903. Claims rejected based on the subcombination of the stand only the instrument not being positively claimed. Pierce discloses a base member (14), a stand member (26), an instrument support (12 and 25), a means for moving/adjustment mechanism being a motor (46), a screw drive (33 and 36).

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***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 9 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pierce 5,483,903 in view of Olivier 5,937,764. Pierce discloses all of the limitations of the claimed invention except for the means for moving comprising a control manipulated by foot. Olivier teaches that it is known to have a means for moving being a motor comprising a control manipulated by foot (50). It would have been obvious to one having ordinary skill in the art to have modified Pierce to have included the control being manipulated by foot as taught by Olivier for the purpose of providing ease of moving the table up and down allowing the user's hands to be free to perform other tasks.

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***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 7, 19-21, 28, and 30 are rejected under 35 U.S.C. 102(b) as being anticipated by Burdi et al. (Burdi) 6,286,441. Burdi discloses base member (30), a stand member (56), an instrument support (12), a means for moving/adjustment mechanism being a motor (40), a screw drive (44), and control (100) being exterior to the at least one stand member.

Claims 9 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burdi 6,286,441 in view of Olivier 5,937,764. Burdi discloses all of the limitations of the claimed invention except for the means for moving comprising a control manipulated by foot. Olivier teaches that it is known to have a means for moving being a motor comprising a control manipulated by foot (50). It would have been obvious to one having ordinary skill in the art to have modified Burdi to have included the control being manipulated by foot as taught by Olivier for the purpose of providing ease of moving the table up

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and down allowing the user's hands to be free to perform other tasks.

***Response to Arguments***

Applicant's arguments filed May 9, 2005 have been fully considered but they are not persuasive.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., instrument) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

In response to applicant's argument that Pierce fails to disclose, teach or suggest an instrument being supported on the stand without removing the instrument, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must



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result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963). Pierce clearly teaches of a instrument stand for supporting an instrument since a table having a horizontal surface which is capable of vertical adjustment would be capable of supporting an instrument while adjusting to the desired height. The applicant has failed to point out the structural difference between Pierce and the claimed invention except for indicating that Pierce does not disclose an instrument which applicant fails to positively claim. The worksurface of Pierce adjusts evenly when reaching the desired height would allow the instrument to supported on the invention without sliding off.

In response to applicant's arguments that Pierce does not disclose a "means for moving said instrument support vertically along said length of said at least one stand member" the examiner would like to point out that the stand member is referred to as element 26 and the instrument support is referred to as 12 including 25 which clearly slides to "move vertically along" the length the stand member 26 in order for the instrument support 12 including 25 to be positioned at the desired height.

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In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Oliver is combined with Pierce to teach that it is well known in the art that a motor may be activated by the use of a foot pedal which acts as a controller.

#### **Conclusion**

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

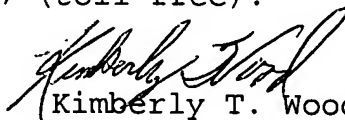
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however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kimberly T. Wood whose telephone number is 571-272-6826. The examiner can normally be reached on Monday-Thursday 7:30am to 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Olszewski can be reached on 571-272-6788. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Kimberly T. Wood  
Primary Examiner

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July 24, 2005